

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 25, 2005 Session

STATE OF TENNESSEE v. COURTNEY PARTIN

Appeal from the Criminal Court for Campbell County
No. 11082 E. Shayne Sexton, Judge

No. E2004-02998-CCA-R3-CD - Filed March 21, 2006

A Campbell County Criminal Court jury convicted the defendant, Courtney Partin, of one count of attempted first degree murder, a Class A felony, and two counts of aggravated assault, a Class C felony. The trial court merged one of the counts of aggravated assault into the attempted first degree murder count and sentenced the defendant to twenty-four years for the attempted first degree murder and five years for the aggravated assault to be served consecutively in the Department of Correction for an effective sentence of twenty-nine years. The defendant appeals, claiming that the trial court erred in not granting his motion to suppress, that the trial court erred in its instructions to the jury on lesser included offenses, that his trial counsel was ineffective, and that the trial court improperly sentenced him in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Concluding that no reversible error exists, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JOHN EVERETT WILLIAMS, J., joined.

Douglas A. Trant, Knoxville, Tennessee, for the appellant, Courtney Partin.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; William Paul Phillips, District Attorney General; and Michael Olin Ripley, Senior Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to the defendant's firing gunshots into the house of John and Linda Vanover while they were inside. A Campbell County grand jury indicted the defendant for attempted first degree murder and two counts of aggravated assault by placing the victims in fear and using a deadly weapon. The co-defendant, Edward Goins, who testified for the state, was indicted on two counts of aggravated assault and one count of accessory after the fact. The jury convicted the defendant as indicted.

At the trial, Tennessee Highway Patrol Officer Ron Lemarr testified that he was a member of the Critical Incident Response Team which conducted crime scene investigations and reconstruction. He said he completed a forensic map and took photographs of the Vanovers' house and surrounding property. He said he was able to trace two of the bullets found in the back corner of the Vanovers' house to Davis Chapel Road based on their entrance and exit holes.

On cross-examination, Officer Lemarr acknowledged that the incident occurred on January 13, 2002, and that he was not called until sixteen days later. He said the front of the victims' house faced Davis Chapel Road. He identified the locations of bullet entrance and exit holes, including an entrance hole through a side window in the front of the house with the exit hole through a back window, a bullet hole near the roof, and bullet holes in the basement area.

Robert Robl, the victims' neighbor, testified that on January 13, 2002, around 11:30 p.m., he was lying in bed when he heard gunfire. He said he immediately called 9-1-1. He said he had been in the military and thought it was automatic gunfire because he heard about eighteen to twenty shots. He said he did not see anything when he first looked outside but then heard a car start up and leave. On cross-examination, Mr. Robl admitted that he was asleep before he heard the gunshots. He acknowledged giving a statement to a deputy and telling the deputy he heard between fifteen and twenty shots.

Eddie Robbins, the victims' neighbor, testified that on January 13, 2002, he was lying in bed and heard ten to twelve shots. He said it sounded like an automatic rifle. He said he looked around but did not see anyone or any cars. On cross-examination, Mr. Robbins stated that he was watching television when he heard the shots. He acknowledged that he may have told the deputy that he heard twelve to fifteen gunshots. He said he thought the shots lasted around thirty seconds.

John Vanover, one of the victims, testified that he had lived on Davis Chapel Road with his wife, Linda Vanover, and his youngest son. He said that on January 13, 2002, they had guests to their house for dinner. He said the guests left approximately one hour before the incident. He said his son also left to take the son's girlfriend home. He said that around 11:30 p.m., he and his wife were getting ready for bed. He said that the light in the master bathroom was on and that his wife was sitting on the bed in the master bedroom. He said he walked out of the master bathroom and into an adjacent laundry room when he heard a car with a loud pipe. He said he thought it was his son but looked out the laundry room window and saw it was not. He said he saw a car coming up the hill in the driveway but could not tell what kind of car it was except it had a small motor. He said that as he turned his back to the window, the gunfire started and he heard bullets hitting the house. He said he could hear the shots hitting the vinyl siding and glass breaking. He said the bullets began striking the house either in the basement, directly underneath him, or in the bathroom beside him. He said that the gun sounded like a semiautomatic or an automatic weapon and that whoever was firing the gun was trying to shoot him. He said he had been a police officer for twenty-nine years and had received weapons training. He said the gunshots were very close to where he had been standing.

Mr. Vanover testified that he knew the defendant but had only had contact with him through the court system. He said he also knew the defendant's father through the court system and as a member of the community. He said his niece, Tiffany Sanders, was dating the defendant at the time of the incident. He said the only lights on during the shooting were the lights in the master bedroom, master bathroom, and the laundry room. He said he had an outside light close to the center of the house, which was where most of the bullets hit. He said the windows near the outside light were reflective windows, which would have made the inside of the house near those windows appear to be lit. He said he was in extreme terror during the shooting. He said he grabbed his automatic handgun and went to the basement where he kept his shotgun. He said he opened the door from the basement going outside but did not see anything. He said he went upstairs and waited for the police. He said he searched the house to make sure no one was inside.

On cross-examination, Mr. Vanover acknowledged that there were no bullet holes in the laundry room or master bedroom. He identified on a diagram that three shots were fired into the basement area, one shot near the roof, two shots into the bathroom, and two shots into his son's bedroom. He said two shell casings were found in his driveway near Davis Chapel Road.

Linda Vanover, the second victim, testified that on January 13, 2002, she and her husband were getting ready for bed and that as she sat down on the bed, the shooting started. She said she remained on the bed, afraid the bullets were going to splinter the floor. She said she and her husband were talking to each other during the gunfire. She said the gunfire seemed to last for an eternity and went from one end of the house to the other. She said she felt fear and disbelief. She said that the defendant had gone to school with her sons but that she had never had a conversation with him. She said she had no physical injuries but was afraid after the incident.

On cross-examination, Mrs. Vanover acknowledged that although her bed was between two windows, it was against a solid wall. She admitted she never looked out the window during the incident and had remained on the bed until the gunfire stopped.

Tennessee Bureau of Investigation (TBI) Special Agent Charles Scott testified that he assisted in the investigation of the shooting at the victims' house. He said he searched the defendant's house at 7286 Stinking Creek Road pursuant to a search warrant. He said he recovered thirty used shell casings and six spent bullets from a 7.62 caliber weapon. He said they sent the shell casings and bullets to the ballistics section of the TBI for comparison to the shell casings and bullets found at the victims' house. He said weapons were recovered at the Stinking Creek address but none were 7.62 caliber weapons.

On cross-examination, Agent Scott acknowledged that the defendant, Ava Partin, and Russ Partin lived at 7286 Stinking Creek Road. He admitted he did not know who fired the shell casings or when they were fired. He acknowledged the shell casings had a mark showing they were 7.62 by 39 caliber. He acknowledged several types of weapons can fire the type of bullets found.

Campbell County Sheriff's Deputy Jonathan Finley testified that he had worked for the sheriff's department for approximately eight years. He said he arrived at the victims' house at 11:38 p.m. on January 13, 2002. He said he inspected the inside and outside of the house and found numerous bullet holes through the upper and lower portions of the house. He said the largest concentration of bullet holes was at the back of the house near the victims' bedroom. He said he found six shell casings at various locations along Davis Chapel Road and at the victims' driveway entrance. He said he watched an officer remove bullets out of the backs of chairs and walls.

Campbell County Sheriff's Deputy Marty Blackwell testified that he had worked for the sheriff's department for almost fourteen years. He said he participated in a search at the defendant's house on Stinking Creek Road on January 24 and 25, 2002. He said he found a booklet for an assault weapon wrapped in a plastic bag in a top dresser drawer in the defendant's parents' bedroom.

Steven Day testified that he owned Day's Militaria in Clinton, Tennessee, which sold army and navy surplus and firearms. He said he was a federally licensed dealer of firearms and had been in business approximately ten years. He identified a sale and purchase form dated October 2, 2001, showing he sold a Norinco MAK-90 Sporter, which was a sporting version of an AK-47, to Denzil Russ Partin. He said Mr. Partin's address was listed as 7286 Stinking Creek Road in Campbell County, Tennessee. He said the MAK-90 was a 7.62 by 39 caliber weapon. He said the booklet entered as an exhibit was the instruction manual for the MAK-90 rifle he sold to Mr. Partin. He said an SKS was an older version of the AK-47, which is also a semiautomatic and similar to the MAK-90. He said both the MAK-90 and SKS are primarily 7.62 by 39 caliber.

Christopher Finley testified that he was the defendant's friend. He said he knew Mr. Vanover and the defendant's father. He said he stopped by the defendant's house on Lilac Drive a couple of months before the incident because the defendant wanted to borrow a tool. He said that while he was there, the defendant showed him a gun and wanted to know where he could get a cleaning kit and a sling. He said he thought the gun was a MAK-90 and similar to the gun in the booklet exhibit. He said the defendant showed him the gun while the defendant's girlfriend, Tiffany, was there. On cross-examination, Mr. Finley admitted that he did not know what month he had the conversation with the defendant.

Patricia Bunch testified that she knew Mr. Vanover and remembered the night of the incident. She said Eric Goins, the co-defendant, was her ex-husband's cousin. She said that near the night the incident happened, around 12:30 a.m., she heard a knock on the door. She said she did not get up to answer the door but heard someone hollering. She said she heard Mr. Goins' voice and she saw his small gray car. She said that a few days later she found two bullets outside her house, picked them up, and threw them over the hill. She said she also found a shotgun shell box near her garbage cans but did not know who put it there.

On cross-examination, Ms. Bunch acknowledged that she found the bullets near her front porch a few days after Mr. Goins had been there. She acknowledged she did not see who put the

bullets there. She said she threw them down the hill because she did not want to get involved in whatever Mr. Goins had done and wanted to keep “the law” away from her house.

TBI Special Agent Steve Vinsant testified that he had worked for the TBI for seven years. He said he investigated this incident and collected a white ammunition box and two live rounds of 7.62 ammunition from Ms. Bunch’s house.

Darren Williamson testified that he knew the defendant and that Tiffany Sanders, the defendant’s girlfriend, was his niece. He said he had been convicted of burglary, theft, and driving under the influence. He said he knew Mr. Vanover and where he lived. He said that one night the defendant was at his house and that they were drinking moonshine. He said that after he said something about wanting to get back at a guy who had caused him to need stitches, the defendant said, “I’d like to get Johnny Vanover.” He said that he asked the defendant, “Why?” and that the defendant said it was because the defendant’s dad was in jail and Mr. Vanover had kept him from getting out. He said the defendant said he would like to shoot Mr. Vanover or burn Mr. Vanover’s house down. He said that on the night of the incident, the defendant called his house around 3:00 a.m. and asked for a ride. He said he told the defendant he was not going to get him, and the defendant cussed him and said “I ought to shoot you, I ought to burn your house down.” He said Ms. Sanders and his nephew, Billy Sanders, went to pick up the defendant.

On cross-examination, Mr. Williamson admitted that he did not care much for the defendant anymore. He admitted that he took one drink of moonshine the night the defendant made the statements and that the defendant made the statements a few nights before the incident. He admitted the defendant was also drinking and taking pills. He said the defendant told him Mr. Vanover had tried to increase the defendant’s father’s bond and kept the defendant’s father from getting out of jail. He acknowledged the defendant’s father was in jail at the time. He acknowledged he did not call Mr. Vanover to tell him about the defendant’s statements. He said he thought the defendant was drunk and joking.

Billy Sanders, Jr., testified that Tiffany Sanders was his sister and that he was related to Mrs. Vanover. He said he knew the defendant because they had gone to school together and were friends. He said he heard the defendant make threats against Mr. Vanover, saying he would like to burn Mr. Vanover’s house down or shoot Mr. Vanover. He said he thought the defendant was joking. He said that on the night of the incident, the defendant had been at Mr. Williamson’s house around 8:00 or 9:00 p.m., left, and came back around 1:00 or 1:30 a.m. He said he went with his sister to pick up the defendant from Ivey Hollow, “right directly up the road [from the victims’ house], probably not even two minutes.” He said the defendant was wearing camouflage and an orange toboggan. He said the defendant had a couple of bullets in his hand when he got into the car. He said the bullets were similar to the two bullets found at Ms. Bunch’s house.

On cross-examination, Mr. Sanders acknowledged that he did not like what the defendant had done to his sister. He said that he thought the defendant made the statements about Mr. Vanover a day or two before the incident but that the defendant had said them two or three times. He

acknowledged he had told an officer he did not think the defendant was serious. He admitted they had been drinking moonshine the night the defendant made the statements but said he was not drunk. He also admitted the defendant had taken some pills. He acknowledged that Mr. and Mrs. Vanover were his uncle and aunt and that he did not call to tell them the defendant had threatened Mr. Vanover.

Eric Goins testified that he had been the defendant's friend in the past but was not his friend anymore. He acknowledged he was a co-defendant in this case and had been charged with two counts of aggravated assault and one count of accessory after the fact. He acknowledged he pled guilty to the three charges and received a sentence of six years on each count of aggravated assault and two years on the accessory after the fact. He acknowledged his sentence would be determined by the court and the state would take into account his cooperation in its final recommendation to the court. He said he had a couple convictions for marijuana and a conviction involving "an incident over [his] stepfather." He said that he knew Mr. Vanover and that Mr. Vanover had helped him out with a few minor cases.

Mr. Goins testified that on January 13, 2002, he stopped at the defendant's house on Lilac Drive and they worked on the defendant's car because the defendant was having car trouble. He said the defendant asked for a ride to drop off a gun. He said he had given the defendant rides in the past. He said the defendant directed him where to drive. He said he drove up a gravel road, took a right as instructed, and then the defendant hung out the car window and started shooting. He said he panicked and tried to pull the defendant into the car. He said he drove away because he could not get the defendant to stop shooting. He said the defendant told him that "they" were after him and going to "get" him. He said he asked the defendant who was going to get him, and the defendant said, "The law." He said the defendant told him, "It was Johnny Vanover's house." He said he took the defendant to the defendant's house on Lilac Drive and went home. He said that at the time of the shooting, he did not know where Mr. Vanover lived. He said he did not call the police or Mr. Vanover. He said the defendant had a machine gun, known as an AK-47, with a long clip in it. He identified the gun in the booklet exhibit as the gun the defendant had used. He said that before they left the defendant's house, both he and the defendant took some Xanax and Valium.

On cross-examination, Mr. Goins acknowledged he stayed at the defendant's house for approximately two hours before they left. He acknowledged that he took quite a few pills and that the defendant had not forced him to take them. He said he did not have any concerns about giving the defendant a ride because he thought he was doing him a favor. He said they did not discuss going over to the victims' house. He admitted he considered Mr. Vanover to be a friend but denied he had ever been to his house. He said he did stop in front of the victims' house because he was trying to get the defendant back into the car. He admitted that a few days after the shooting, he went to the defendant's house and "hung out" with him. He acknowledged having been convicted of simple possession, assault, vandalism, evading arrest, and reckless endangerment. He admitted that at his plea hearing, he told the court he did "knowingly cause John Vanover to fear eminent [sic] bodily injury by shooting into a dwelling."

On re-direct examination, Mr. Goins testified that at the plea hearing, he entered into a stipulation with the state that he and the defendant had committed the aggravated assaults. He said they stipulated he acted alone in providing the defendant with the ability to get away undetected.

Richie Peters testified that he had been the defendant's friend for approximately ten years. He said that he knew Mr. Vanover. He said that a few days after the shooting, the defendant called him and asked for a ride from the Jellico Motel to the defendant's grandmother's house in LaFollette. He said he picked up the defendant and Ms. Sanders around 9:00 or 10:00 p.m. He said the defendant did not mention anything about Mr. Vanover. He said the next night the defendant called him and asked him to drop off some cigarettes. He said he took cigarettes to the defendant's grandmother's house and talked with the defendant. He said he told the defendant he had seen the defendant's and Ms. Sanders' pictures on the news, and the defendant confessed to shooting into Mr. Vanover's house over thirty times. He said he had seen the defendant with an assault rifle at the defendant's house on Stinking Creek Road two days before he took the defendant to his grandmother's house.

Mr. Peters testified that he had been convicted of felony vandalism and misdemeanor assault and had a pending charge for being a habitual motor vehicle offender. He said he was on probation and had violated the law by driving to the Jellico Motel to pick up the defendant. He said he had been charged with being an accessory after the fact for aiding the defendant and planned to enter a guilty plea the next day. He said the state's recommended sentence was two years on probation but the manner of service would be determined by the court. He said his cooperation in testifying would be considered by the state in its final recommendation to the court.

On cross-examination, Mr. Peters acknowledged that his probation had been revoked because of the accessory after the fact charge. He acknowledged that when he spoke to a detective on January 25, 2002, he did not mention the conversation he had with the defendant. He admitted he told the detective the defendant was not at his grandmother's house when he went there the second time. He admitted the news story about the defendant did not involve what happened at the victims' house but dealt with a situation at Stinking Creek Road involving the defendant's father, Mr. Russ Partin. He acknowledged that he had been to the defendant's houses on Lilac Drive and Stinking Creek Road and that he had seen guns at both. He said he did not call Mr. Vanover or the police to tell them what the defendant had told him.

Bradley Sweat testified that he was in jail serving sentences for simple possession and possession of drug paraphernalia. He said he had also been convicted of felony possession of marijuana. He said he had known the defendant for approximately ten years and knew Mr. Vanover. He said he had been at the defendant's house on Lilac Drive and had a conversation with Ms. Sanders but could not remember the date of the conversation. He said in response to that conversation, the defendant said that "before he would go to jail[,] he'd kill Vanover and take care of him himself." He said he had not been offered anything for testifying.

On cross-examination, Mr. Sweat acknowledged that he did not remember when the defendant made the statement to him. He acknowledged that sometimes he was the defendant's friend and sometimes he was not. He acknowledged not telling Mr. Vanover about the defendant's statement.

Michelle Morris testified that she was the defendant's friend and had known him most of her life. She said she had visited the defendant in jail and they had written letters to each other. She said the defendant's mother delivered a letter to her. She read part of the letter to the jury stating, "Are you going to go to Court and say that you came and got me on January 13th, 2002, and we rode down the road from eleven to twelve? Remember, we rode up the road and smoked a joint." She said she did not go out with the defendant on January 13, 2002, between eleven and twelve. She said she did not remember where she was on January 13, 2002. She said she had gone for a ride with the defendant and smoked a joint during the daytime and nighttime but she did not remember the dates. She said she knew she was not with the defendant on the weekend of January 13, 2002, because she had her son's birthday party that weekend.

On cross-examination, Ms. Morris acknowledged that the defendant had not said anything to her about the shooting and that she did not become aware of it until after the defendant went to jail. She admitted telling the defendant's attorney she had been with the defendant around January 12 or 13, 2002.

Agent Steve Scott testified that he was a forensic scientist with the TBI assigned to the firearms identification unit in the crime laboratory in Nashville. He said he identified the cartridge cases and fired bullets found at the victims' house and determined them to be 7.62 by 39 millimeter from Tula Cartridge Works designed for military-type weapons like the AK-47, SKS, and Chinese type 56. He said the cartridge cases from the victims' house were all of the same caliber, fired from the same type of weapon, and 7.62 by 39 millimeter. He said all the cartridge cases identified as coming from the defendant's house are from the same manufacturer, type, and class characteristics as those identified as coming from the victims' house. He said the fired bullets found at the defendant's house were designed to be fired from a 7.62 by 39 millimeter rifle. He said the weapon described in the booklet exhibit, a MAK-90, could have fired all the bullets and cartridge cases he identified in this case.

Agent Scott testified that the week before trial, he conducted a second examination of the bullets and cartridge cases because the defendant's attorney had contacted him. He said that after talking to the defendant's attorney, he recognized the defendant's last name and thought it could possibly be related to the investigation of the defendant's father's attempted suicide. He said that after examining bullets and shell casings from the defendant's father's case, he was able to match characteristics of the bullets and cartridge cases found at the victims' house and the defendant's house. He said he was able to determine that one of the bullets from the victims' house and one of the bullets from the defendant's house had been fired from "one gun and one gun only." He said he was also able to determine that seven of the cartridge cases from the defendant's house and two cartridges from the victims' house were fired from "one gun and one gun only." He said the

cartridges and bullets in this case were sold in boxes like the Tula Cartridge Works box found at Ms. Bunch's house. He said the unfired cartridges found at Ms. Bunch's house are the same type found at the victims' and defendant's houses.

On cross-examination, Agent Scott admitted that he did not compare the two cases involving the cartridges and bullets from the victims' house to those from the defendant's house until a week before trial. He acknowledged he had not seen a rifle in this case. He acknowledged that nine manufacturers make rifles that fire 7.62 by 39 millimeter caliber bullets.

Mr. Russ Partin testified that the defendant was his son and that he lived on Stinking Creek Road. He said he had purchased a MAK-90 rifle and had fired the rifle at his house on Stinking Creek Road. He said he had another home on Pine Trail and had kept the rifle there. He said that on January 12, 2002, his house on Pine Trail caught on fire and the MAK-90 was inside the house. He said he went to the Pine Trail house on January 13, 2002, and the guns and VCR were missing from the house. He said he called the sheriff's department and told them he wanted to make a report. He said he never recovered the rifle.

On cross-examination, Mr. Partin acknowledged the house that caught on fire, which he referred to as the Pine Trail house, was located on Lilac Drive. He said he had been living at the house on Stinking Creek Road for two to four years. Mr. Partin exercised his Fifth Amendment right when asked if he knew who was in his house on Lilac Drive on January 12, 2002, and if he had conspired to destroy the house by fire. The defendant was convicted upon the foregoing evidence.

I. MOTION TO SUPPRESS

The defendant contends that the trial court erred in failing to grant his motion to suppress the evidence seized at the Stinking Creek property because the search warrant involved was unconstitutional under Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978). He asserts the state made negligent representations by using the affidavit for the Lilac Drive property for the search of the Stinking Creek property. He also asserts the state failed to provide sufficient evidence of the criminal backgrounds of the alleged informants. He contends that once the wrongfully included information is deleted from the affidavit, there is not sufficient probable cause to conduct a lawful search. The state contends that the affidavit of the search warrant alleged sufficient facts from which the magistrate could and did find probable cause to issue the search warrant. The state asserts the portion of the affidavit of the Stinking Creek property search warrant explaining the property's location was properly changed. The state contends that the warrant was not based upon information by a confidential informant. The state asserts that once the erroneous statements included in the Stinking Creek property affidavit are redacted, there is still sufficient evidence for probable cause.

At the motion to suppress hearing, TBI Special Agent Charles Scott testified that he was the affiant for the affidavits for the Lilac Drive property and the Stinking Creek property search warrants. He said he reviewed the Stinking Creek property affidavit with the assistant district attorney and redacted some portions in order to submit it as an exhibit. He said the information

supporting the search, on page one of each search warrant, was the same for both the Lilac Drive property affidavit and the Stinking Creek property affidavit. He said that in looking for the truthfulness of the statements, he overlooked the location to which he was referring in the affidavit when it said "residence." He said that in the affidavit for the Stinking Creek property when the phrase "above described residence" was used, it actually referred to the Lilac Drive property and was not intended to refer to the Stinking Creek property. He said that all the statements on page two of the Stinking Creek property affidavit that said "residence" correctly referred to the Stinking Creek property, unless it specifically said Lilac Drive.

Agent Scott testified that on January 24, 2002, a search was conducted of the property pursuant to the written consent of the defendant's mother, Mary Ava Partin. He said the crime scene unit and officers were present at the Stinking Creek property pursuant to a consensual search until late in the evening of January 25, 2002. He said Deputy Marty Blackwell participated in the search and Deputy Blackwell gave him a clear plastic bag containing a MAK-90 rifle manual.

On cross-examination, Agent Scott acknowledged the only piece of evidence intended to be used in this case and collected during the January 24 and 25, 2002, search was the MAK-90 manual. He admitted he provided the information for the affidavit for the Lilac Drive property and the Stinking Creek property issued on February 4 and 5, 2002, and an assistant district attorney drafted them. He acknowledged appearing before the magistrate and swearing that all the information contained in the affidavits was true and correct. He admitted he filed an inventory pursuant to the Stinking Creek property search warrant. He said the items on the inventory relevant to this case included six spent bullets, thirty spent 7.62 by 39 caliber shell casings, color photographs, and a digital video of the scene.

Campbell County Sheriff's Deputy Marty Blackwell testified that he was present at the defendant's house on Stinking Creek Road on January 24 and 25, 2002, and had participated in the search and collection of evidence. He acknowledged finding a booklet for an assault weapon in the bedroom.

After the testimony and argument by counsel, the trial court stated

The State has used information provided by Christopher Finley given some almost two months prior to the search wherein Mr. Finley talks about specific contact with the defendant and talking about the weapon. It is somewhat older information. I don't think it is stale. I don't think that it is something -- and then when I say stale, I don't think it is so old that it could not be used to support probable cause to issue the search warrant. I mean, there are lots of different -- I'm not sure there's any given standard about staleness, a lot of it's very fact specific doctrine.

....

. . . I don't find any of the information on these affidavits as being indicative of dishonesty - any malfeasance on the part of the State in obtaining this search warrant. Now the question becomes, is there enough information on these affidavits to support the issuance of a search warrant? I find that there is, that there is enough specificity concerning the places, the people involved in this particular case, and the items that were involved in the case that's about to go to trial, or there's enough indication that there may be -- probable cause exists for the search of these different places to gather evidence to investigate this particular crime.

A trial court's factual findings in a motion to suppress hearing are conclusive on appeal unless the evidence preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); State v. Jones, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Odom, 928 S.W.2d at 23. The prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable inferences drawn from that evidence. State v. Hicks, 55 S.W.3d 515, 521 (Tenn. 2001). The application of the law to the facts as determined by the trial court is a question of law which is reviewed de novo on appeal. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997). Because the trial court's findings came from its application of the law to facts in the affidavit, we will review the trial court's findings de novo.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and "article 1, section 7 [of the Tennessee Constitution] is identical in intent and purpose with the Fourth Amendment." State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997) (quoting Sneed v. State, 423 S.W.2d 857, 860 (1968)). In order to comply with the Fourth Amendment, the state must seek the issuance of a search warrant based upon probable cause from a detached magistrate before a house is searched. State v. Jacumin, 778 S.W.2d 430, 432 (Tenn. 1989) (citing Johnson v. United States, 33 U.S. 10, 13-14, 68 S. Ct. 367, 369 (1948)). Probable cause "is satisfied if the facts and circumstances are such that a reasonably prudent person would be warranted in believing that an offense had been committed and that evidence thereof would be found on the premises to be searched." Green v. Reeves, 80 F.3d 1101, 1106 (6th Cir. 1996) (quoting United States v. Besase, 521 F.2d 1306, 1307 (6th Cir. 1975)); see also State v. Meeks, 876 S.W.2d 121, 124 (Tenn. Crim. App. 1993). In Tennessee, a finding of probable cause supporting the issuance of a search warrant must be based upon evidence included in a written and sworn affidavit, which sets forth sufficient facts upon which a neutral and detached magistrate can find probable cause for issuing the warrant. T.C.A. §§ 40-6-103, -104; Tenn. R. Crim. P. 41(c); Jacumin, 778 S.W.2d at 432; State v. Bryan, 769 S.W.2d 208, 210 (Tenn. 1989). The need for the magistrate's independent judgment means that the affidavit must contain more than merely conclusory allegations by the affiant. "Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." United States v. Ventresca, 380 U.S. 102, 109, 85 S. Ct. 741, 746 (1965).

In Jacumin, our supreme court approved the United States Supreme Court's statement in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983), relative to the duties of magistrates and reviewing courts regarding the determination of probable cause. Jacumin, 778 S.W.2d at 435 n.2.

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . [concluding]" that probable cause existed.

Gates, 462 U.S. at 238-39, 103 S. Ct. at 2332 (citing Jones v. United States, 362 U.S. 257, 271, 80 S. Ct. 725, 736 (1960)).

Three search warrants and affidavits were entered as exhibits at the motion to suppress hearing and in the record for appellate review. These included (1) a search warrant and affidavit for property located on Lilac Drive, (2) a search warrant and affidavit for property located on Stinking Creek Road, and (3) a copy of the Stinking Creek Road search warrant and affidavit with the incorrect information redacted. The items seized during a search at the Stinking Creek property on February 5, 2002, included six spent bullets, thirty spent 7.62 by 39 caliber shell casings, color photographs, and a digital video of the scene. The defendant challenged the Stinking Creek Road affidavit in his motion to suppress and on appeal. The Stinking Creek Road search warrant authorized the seizure of the following property: "Fired shell casings, live ammunition, stolen automotive parts and accessories, weapons, spent rounds, insurance documents, and papers."

The affidavit of the Stinking Creek property search warrant provided the following information purportedly establishing the probable cause to believe fired shell casings, live ammunition, weapons, or spent rounds related to the shooting at the Vanovers' house could be found on the defendant's property.

On or about January 13, 2002, the residence of John Vanover was shot into. Recovered from the scene were several 7.62 X 39 cal. shell casings and several spent rounds. This caliber round is used in Chinese and Russian assault rifles, including Norinco, MAK-90. On or about October 2, 2001, Denzil Russ Partin purchased a Norinco MAK-90 from Day's Militaria in Clinton, Tennessee. On or about January 30, 2002, Christopher Finley told Special Agent Steve Vinsant, Tennessee Bureau of Investigation, that in December 2001, [the defendant] showed Christopher Finley a MAK-90 rifle at the above described location. Christopher Finley also told Special Agent

Vinsant that shortly after seeing this weapon, he heard shooting coming from the above described location.

. . . .

On or about January 24, 2002, officers of the Tennessee Highway Patrol Special Ops Unit, along with agents of the Tennessee Bureau of Investigation and Campbell County Sheriff's Department executed an arrest warrant for Denzil Russ Partin, at the above referenced location. Pursuant to a consensual search, numerous weapons and ammunition were recovered at the above-described location.

. . . The MAK-90 rifle has not yet been recovered. Tiffany Sanders has told affiant that on or about January 23, 2002, she and [the defendant] fled the above described residence and that [the defendant] was armed with a rifle, otherwise unknown to her and that [the defendant] hid the rifle somewhere in the woods between the above referenced residence and I-75.

According to the affidavit, the defendant's father purchased a MAK-90 rifle, Mr. Finley saw the defendant in the possession of a MAK-90 rifle in December 2001, Mr. Vanover's house was shot into with 7.62 by 39 millimeter caliber shells which are used in Chinese and Russian assault rifles, a MAK-90 is such an assault rifle, and the defendant hid a rifle in the woods near his house on Stinking Creek Road on January 23, 2002. However, we conclude the affidavit is devoid of sufficient facts linking the rifle described in the affidavit to the shooting at the Vanovers' house which would cause a prudent person to believe that the rifle or bullets were evidence pertaining to the shooting. Although the affidavit established probable cause to believe the defendant had committed arson or theft and that evidence of these crimes was located on the defendant's property, thereby justifying the seizure of automotive parts or insurance documents, it did not establish probable cause that any evidence concerning the shooting at the Vanovers' house would be located on the defendant's property.

Because we have concluded that probable cause existed to justify a search of the defendant's property for items relating to the arson or theft, the officers were legally on the defendant's property when they seized the bullets, shell casings, color photographs, and a digital video of the scene. However, we conclude that the plain view doctrine affords the state no relief. The plain view doctrine allows for seizure when (1) the items seized are in plain view; (2) the viewer has the right to be in the position to view the items; (3) the seized items were discovered inadvertently, and (4) the incriminating nature of the items is immediately apparent. State v. Horner, 605 S.W.2d 835, 836 (Tenn. Crim. App. 1980).

The officers' seizure of the spent bullets, shell casings, color photographs, and a digital video of the scene cannot be justified by plain view, because the incriminating nature of these items was not discovered inadvertently. The search warrant expressly states that officers were authorized to seize fired shell casings and spent rounds. Therefore, the search fails to meet the third requirement of the plain view doctrine. We conclude that the information contained in the affidavit was insufficient to support a finding of probable cause that the defendant was involved in the shooting of the Vanovers' house and that the officers' seizure of the spent bullets or shell casings found at the defendant's property was not justified under the plain view doctrine. Therefore, we conclude the trial court erred in not suppressing the spent bullets, shell casings, color photographs, and digital video of the scene.

When constitutional error is found, the state has the burden of proving the error was harmless and the reviewing court must be persuaded beyond a reasonable doubt that the error did not affect the trial's outcome. Chapman v. California, 386 U.S. 18, 23-24, 87 S. Ct. 824, 827-28 (1967). The question we must ask is if the state has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24, 87 S. Ct at 828.

In this case, the defendant made statements a few nights before the shooting that he wanted to "get Johnny Vanover" and "would like to shoot Mr. Vanover or burn Mr. Vanover's house down" to Mr. Williamson and Mr. Sanders. The defendant also told Mr. Sweat that before he would go to jail, he would "kill Vanover and take care of him himself." A few nights after the incident, the defendant told Mr. Peters he shot up Mr. Vanover's house over thirty times. The co-defendant, Mr. Goins, testified the defendant asked for a ride, directed him where to drive, hung out the window of the car, and started shooting. After the shooting, the defendant told Mr. Goins, "It was Johnny Vanover's house." On the night of the shooting around 1:00 or 1:30 a.m., the defendant called Mr. Sanders and asked for a ride. Mr. Sanders picked the defendant up "right directly up the road [from the victims' house], probably not even two minutes," and the defendant had two bullets in his hand. The defendant's father purchased a MAK-90 rifle, which was a 7.62 by 39 caliber weapon, in October 2001, and the instruction manual booklet for the MAK-90 was entered as an exhibit at the trial and used by several witnesses to identify the defendant's gun. Mr. Goins said the defendant used an AK-47 which looked like the gun in the booklet exhibit. Agent Steve Scott testified the bullets and shell casings found at the Vanovers' house were 7.62 by 39 millimeter designed to be fired from military-type weapons like the AK-47, SKS, and Chinese type 56 and could have been fired from a MAK-90 rifle. Mr. Peters saw the defendant with an assault rifle at the defendant's house around the time the shooting occurred. We conclude that the trial court's error in not suppressing the fired shell casings, fired bullets, or color photographs of the defendant's residence was harmless beyond a reasonable doubt, and the defendant is not entitled to relief on this issue.

II. LESSER INCLUDED OFFENSES

The defendant asserts that the trial court erred in instructing the jury on the lesser included offenses of attempted first degree murder and aggravated assault. The state asserts that the defendant waived any challenge to the jury instructions for failing to request the instructions in writing to the

trial court. The state also asserts any error in not instructing the jury on lesser included offenses was harmless.

In criminal cases, the trial court has the duty to charge the jury on all of the law that applies to the facts of the case. See State v. Harris, 839 S.W.2d 54, 73 (Tenn. 1992). The record reflects that the defendant did not request a jury instruction on the lesser included offenses. Tennessee Code Annotated section 40-18-110(c) provides

Notwithstanding any other provision of law to the contrary, when the defendant fails to request the instruction of a lesser included offense as required by this section, such instruction is waived. Absent a written request, the failure of a trial judge to instruct the jury on any lesser included offense may not be presented as a ground for relief either in a motion for a new trial or on appeal.

In State v. Robert Page, No. W2003-01342-SC-R11-CD, Shelby County, slip op. (Tenn. Feb. 8, 2006), our supreme court held that Tennessee Code Annotated section 40-18-110(c) does not violate a defendant's right to trial by jury. Page, slip op. at 8. The court also held "that by failing to request such an instruction, the defendant waived his right to seek plenary appellate review of the issue." Id. However, the statute does not preclude plain error review. Id. slip op. at 7.

Rule 52(b), Tenn. R. Crim. P., provides:

(b) Plain Error.— An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice.

See also T.R.A.P. 36(b). Our supreme court has adopted the five factors developed by this court to be considered

when deciding whether an error constitutes "plain error" in the absence of an objection at trial: "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do substantial justice."

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). In order for this court to reverse the judgment of a trial court, the error must be "of such a great magnitude that it probably changed the outcome of the [proceedings],"

and “recognition should be limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial.” Adkisson, 899 S.W.2d at 642.

In State v. Burns, 6 S.W.3d 453 (Tenn. 1999), our supreme court adopted a modified version of the Model Penal Code in order to determine what constitutes a lesser included offense:

An offense is a lesser-included offense if:

(a) all of its statutory elements are included within the statutory elements of the offense charged; or

(b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing

(1) a different mental state indicating a lesser kind of culpability; and/or

(2) a less serious harm or risk of harm to the same person, property or public interest; or

(c) it consists of

(1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or

(2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or

(3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

Burns, 6 S.W.3d at 466-67.

If an offense is a lesser included offense, then the trial court must conduct the following two-step analysis in order to determine if the lesser included offense instruction should be given:

First, the trial court must determine whether any evidence exists that reasonable minds could accept as to the lesser-included offense. In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the

lesser-included offense without making any judgments on the credibility of such evidence. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser-included offense.

Id. at 469.

If a trial court improperly omits a lesser included offense instruction, then constitutional harmless error analysis applies and this court must determine if the error did not affect the outcome of the trial beyond a reasonable doubt. State v. Ely, 48 S.W.3d 710, 725 (Tenn. 2001). “In making this determination, a reviewing court should conduct a thorough examination of the record, including the evidence presented at trial, the defendant’s theory of defense, and the verdict returned by the jury.” State v. Allen, 69 S.W.3d 181, 191 (Tenn. 2002).

A. Attempted First Degree Murder

The defendant asserts the trial court erred in failing to instruct the jury on the following lesser included offenses of attempted first degree murder: (1) facilitation of attempted first degree murder, (2) facilitation of attempted second degree murder, (3) attempted voluntary manslaughter, (4) aggravated assault, (5) criminally negligent homicide, (6) assault, and (7) misdemeanor reckless endangerment. The state asserts any error in not instructing on these lesser included offenses was harmless because the jury rejected the two intervening lesser included offenses of attempted second degree murder and felony reckless endangerment. The state asserts the evidence in this case is uncontested and overwhelming as to the defendant’s guilt of attempted first degree murder. The state asserts any error in failing to charge facilitation is harmless because the evidence at the trial was that the defendant was the shooter and the defense was that someone else committed the offense, not that the defendant facilitated the co-defendant.

1. Facilitation

Facilitation in this case is not a lesser included offense under either part (a) or (b) of the Burns test. Under part (c), however, facilitation is a lesser included offense if it is facilitation of the offense charged. Therefore, facilitation of attempted first degree murder is a lesser included offense of attempted first degree murder. See State v. Tony Price, No. W2002-01376-CCA-R3-CD, Shelby County, slip op. at 5 (Tenn. Crim. App. Sept. 25, 2003). Attempted second degree murder is a lesser included offense of attempted first degree murder and was correctly charged by the trial court, therefore facilitation of attempted second degree murder is also a lesser included offense of attempted first degree murder. See State v. Reginald Merriweather, Nos. W1999-02050-CCA-R3-CD, W2001-02206-CCA-RM-CD, Madison County, slip op. (Tenn. Crim. App. Feb. 11, 2002) (stating that second degree murder is a lesser included offense of attempted first degree murder and inferring that facilitation of second degree murder, as a lesser included offense of attempted second degree murder, is also a lesser included offense of attempted first degree murder).

“[F]acilitation is a separate and distinct theory of liability from that of a principal offender or someone who is criminally responsible for the conduct of another.” State v. Locke, 90 S.W.3d 663, 672 (Tenn. 2002). Facilitation can be found if a person, “knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony.” T.C.A. § 39-11-403(a).

The evidence presented at the trial was that the defendant asked the co-defendant for a ride, that the defendant did not have a car that would run, that the defendant was the shooter, that the defendant made statements that he wanted to shoot Mr. Vanover, and that he shot the Vanovers’ house over thirty times. There was no evidence presented at the trial that Mr. Goins was the shooter. We conclude that no rational juror could have found that the defendant facilitated either attempted first degree murder or attempted second degree murder. The trial court did not err in failing to instruct the jury on the lesser included offenses of facilitation of attempted first degree murder and facilitation of attempted second degree murder, and the defendant is not entitled to relief on this issue.

2. Attempted Voluntary Manslaughter

Attempted voluntary manslaughter requires the attempted killing of another “in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.” T.C.A. §§ 39-12-101; 39-13-211(a). Attempted voluntary manslaughter is a lesser included offense of attempted first degree murder. See Price, slip op. at 6. However, the record is devoid of any facts showing that the defendant acted in a “state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.” We conclude that no rational juror could have found the defendant acted in a state of passion. The trial court did not err in failing to instruct the jury on the lesser included offense of attempted voluntary manslaughter, and the defendant is not entitled to relief on this issue.

3. Aggravated Assault and Assault

Attempted first degree murder is the attempt to kill another when the defendant acts with premeditation. See T.C.A. §§ 39-12-101; 39-13-202(a)(1). Assault, as it would apply to the facts of this case, requires that a person “[i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury.” T.C.A. § 39-13-101(a)(2). Aggravated assault, as it would apply to the facts of this case, requires an assault as defined under Tennessee Code Annotated section 39-13-101(a)(2) and use of a deadly weapon. See T.C.A. § 39-13-102(a). Aggravated assault and assault are not lesser included offenses of attempted first degree murder. See State v. Christopher Todd Brown, No. M1999-00691-CCA-R3-CD, Davidson County, slip op. at 2 (Tenn. Crim. App. Mar. 9, 2000) (holding that any variety of aggravated assault and assault is not a lesser included offense of attempted first degree murder under the Burns test because the statutory elements are different). We conclude that the trial court did not err in failing to instruct the jury on aggravated assault and assault, and the defendant is not entitled to relief on this issue.

4. Criminally Negligent Homicide

Criminally negligent homicide requires criminally negligent conduct that results in death. See T.C.A. § 39-13-212(a). There was no death in this case. We conclude that the trial court did not err in failing to instruct the jury on criminally negligent homicide, and the defendant is not entitled to relief on this issue.

5. Misdemeanor Reckless Endangerment

Misdemeanor reckless endangerment occurs when a person “recklessly engages in conduct which places or may place another person in imminent danger of death or serious bodily injury.” T.C.A. § 39-13-103(a). Reckless endangerment is a lesser included offense of attempted first degree murder. See State v. Rush, 50 S.W.3d 424, 431-32 (Tenn. 2001) (holding that misdemeanor reckless endangerment is a lesser included offense of attempted second degree murder under part (b) of the Burns test); see also State v. Horace Demon Pulliam, No. M2001-00417-CCA-R3-CD, Davidson County, slip op. at 5 (Tenn. Crim. App. Jan. 23, 2002) (citing Rush and holding that if misdemeanor reckless endangerment is a lesser included offense of attempted second degree murder, then it is also a lesser included offense of attempted first degree murder).

The victims testified that bullets were fired into the area of the house they occupied. We conclude that a rational juror could have found the defendant’s actions to be reckless, placing the victims in imminent danger of death or serious bodily injury, and we hold that the trial court should have instructed the jury on reckless endangerment as a lesser included offense of attempted first degree murder.

However, our supreme court has held that when a jury convicts on the greater offense to the exclusion of the immediately lesser offense, the jury necessarily rejected all other lesser included offenses. State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998). The trial court instructed the jury on the charged offense of attempted first degree murder and the immediately lesser included offense of attempted second degree murder. The jury chose to convict the defendant of the greater offense. Therefore, consideration of the trial court’s error is not necessary to do substantial justice, and the defendant is not entitled to relief on this issue.

B. Aggravated Assault

The defendant asserts the trial court erred in failing to instruct the jury on the following lesser included offenses of aggravated assault: (1) reckless aggravated assault, (2) simple assault, (3) misdemeanor assault by causing reasonable fear of bodily injury, and (4) misdemeanor assault by extremely offensive or provocative contact. The defendant also asserts the trial court erred in instructing the jury that felony reckless endangerment was a lesser included offense of aggravated assault.

The state asserts reckless aggravated assault and simple assault are not lesser included offenses in this case. The state asserts that misdemeanor assault by extremely offensive or provocative contact is not a lesser included offense because it requires provocative or offensive contact and no such contact was alleged or established in this case. The state concedes misdemeanor assault by causing reasonable fear of bodily injury is a lesser included offense under part (a) of the Burns test but claims any error was harmless. The state also asserts that because the jury convicted the defendant as charged, the jury never reached the question of whether the defendant committed felony reckless endangerment, making the instruction on felony reckless endangerment harmless error.

1. Reckless Aggravated Assault

Aggravated assault is an assault with serious bodily injury or use of a deadly weapon. See T.C.A. § 39-13-102(a). Reckless aggravated assault requires that a person recklessly causes bodily injury to another and that the bodily injury is serious or a deadly weapon is used. See T.C.A. §§ 39-13-102(a)(2); 39-13-101(a)(1). Reckless aggravated assault is not a lesser included offense of aggravated assault by placing a person in fear and using a deadly weapon under the Burns test. See State v. Goodwin, 143 S.W.3d 771, 776-77 (Tenn. 2004) (holding that reckless aggravated assault is not a lesser included offense of aggravated assault based on knowingly or recklessly causing another to fear imminent bodily injury because reckless aggravated assault requires an element that is not found in such offense - bodily injury). We conclude that the trial court did not err in failing to instruct the jury on reckless aggravated assault and that the defendant is not entitled to relief on this issue.

2. Simple Assault by Causing Bodily Injury

Simple assault can be found if a person intentionally, knowingly, or recklessly causes bodily injury to another. See T.C.A. § 39-13-101(a)(1). There was no bodily injury to either victim in this case. We conclude that no rational juror could have found that simple assault under Tennessee Code Annotated section 39-13-101(a)(1) was committed and that the defendant is not entitled to relief on this issue.

3. Assault by Causing Reasonable Fear of Bodily Injury

Under Tennessee Code Annotated section 39-13-101(a)(2), an assault can be found if a person “[i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury.” Assault under this section is a lesser included offense of aggravated assault by placing the victims in fear and using a deadly weapon under part (a) of the Burns test. See State v. Thomas Wayne Shields, No. W2000-01524-CCA-R3-CD, Henry County, slip op. at 4 (Tenn. Crim. App. Jan. 4, 2002) (applying part (a) of the Burns test in holding assault to be a lesser included offense because it is an essential element of aggravated assault). Therefore, it was error for the trial court not to charge assault under this section as a lesser included offense. However, the fact that a 7.62 by 39 millimeter caliber weapon was fired at the victims’ house is uncontroverted. We conclude that no

rational juror could have found that assault under Tennessee Code Annotated section 39-13-101(a)(2), not aggravated assault, was committed, and the defendant is not entitled to relief on this issue.

4. Misdemeanor Assault by Extremely Offensive or Provocative Physical Contact

Assault under Tennessee Code Annotated section 39-13-101(a)(3) can be found if a person “[i]ntentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.” Generally, assault under this section is a lesser included offense of aggravated assault. See State v. Smiley, 38 S.W.3d 521, 524 (Tenn. 2001) (applying Burns test part (a) when the defendant was charged with aggravated assault by serious bodily injury). However, in this case, there was no physical contact between the defendant and the victims. We conclude that no rational juror could have found that misdemeanor assault by extremely or offensive and provocative physical contact was committed, and the defendant is not entitled to relief on this issue.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant contends that he received the ineffective assistance of counsel because his attorney was ineffective for (1) failing to have his only witness, the defendant’s father, dress in street clothes and (2) failing to show no probable cause existed in the affidavit for the Stinking Creek Road search warrant. The state asserts that the defendant has failed to show by clear and convincing evidence that his attorney was ineffective. The state asserts that it was a last minute decision to have the defendant’s father testify and that logistical difficulties existed in getting the defendant’s father to the trial because he had been hospitalized immediately before his testimony. The state asserts the defendant’s father’s incarceration would have been presented to the jury. The state also asserts the attorney filed and argued a motion to suppress evidence.

At the motion for a new trial hearing, the defendant testified that his father was in maximum security clothes and chains when he testified. He said he asked the attorney to have his father dressed in street clothes. He said Brad Sweat, a state’s witness, dressed in street clothes even though he was in custody. On cross-examination, the defendant acknowledged that Mr. Sweat was being kept in the jail and the defendant’s father was in the custody of the Department of Correction because of his medical condition. He said the significance of his father’s testimony was that the MAK-90 was his father’s gun.

The defendant’s attorney testified that he did not recall any discussions with the defendant about the defendant’s father being dressed in street clothes. He said he did not make a motion to have him in street clothes because he “didn’t really know [that] he would be coming in until he got here.” He said the defendant’s father had been in the hospital a day or two before the trial. He said he filed a motion to suppress the search warrants and had a lengthy suppression hearing on the matter. On cross-examination, the attorney acknowledged that case law stated that a defendant should not be dressed in jail clothes, shackled, or handcuffed, but he did not know if the same were

true for witnesses. He said that in retrospect, he did not see that having the defendant's father in jail clothes was a problem, but he acknowledged it may have had an effect on the jury.

Ineffective assistance of counsel claims can be raised on direct appeal, and we apply the same standard used for such claims in post-conviction proceedings. See Burns, 6 S.W.3d at 461 n.5. When a claim of ineffective assistance of counsel is made under the Sixth Amendment, the burden is upon the complaining party to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court ruled that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. The court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

The approach to the issue of the ineffective assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice is not shown, we need not seek to determine the validity of the allegations about deficient performance. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069. In order to establish prejudice, the defendant must show that a reasonable probability exists that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Burns, 6 S.W.3d at 463 (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

The defendant has the burden of proving by clear and convincing evidence the factual allegations that would entitle the defendant to relief. See Burns, 6 S.W.3d at 461 n.5; see also T.C.A. § 40-30-110(f). On appeal,

a trial court's findings of fact underlying a claim of ineffective assistance of counsel are reviewed . . . under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions.

Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001) (citations omitted); see also Burns, 6 S.W.3d at 461 (holding that appellate review of the trial court's conclusion regarding the effectiveness of counsel is de novo because it involves a mixed question of law and fact).

The trial court's order did not directly address the claim for the ineffectiveness of counsel raised by the defendant. The trial court's order simply said, "After review of the case file, pertinent transcripts, and consideration of arguments by counsel for the defendant and the State, the Court finds no basis to grant defendant's motion for new trial."

A. Witness's Clothes

The defendant asserts the appearance of the defendant in shackles or prison clothes prejudices the defendant and relies on Willocks v. State, 546 S.W.2d 819 (Tenn. Crim. App. 1976). In Willocks, the court held that in-court shackling of a defendant was inherently prejudicial. Willocks, 546 S.W.2d at 822. However, this court has declined to conclude that a defense witness appearing in prison clothes, without more, amounts to prejudice. See State v. Charles Day Allen, No. M2002-03144-CCA-R3-PC, Davidson County, slip op. at 3 (Tenn. Crim. App. Feb. 4, 2004), app. denied (Tenn. Sept. 7, 2004) (when a witness appeared in prison clothes and the attorney acknowledged he would have the witness in street clothes if he could do the trial over, the court concluded the defendant failed to meet the burden of proving either prong for his claim of ineffective assistance).

In this case, the attorney testified that he did not remember the defendant requesting that his father be dressed in street clothes. He also testified he did not know the defendant's father was going to testify until he arrived. The defendant testified that the importance of his father's testimony was to show the jury that the MAK-90 rifle belonged to his father. Before the defendant's father testified at the trial, Mr. Day testified that he sold the gun to the defendant's father. We conclude that the defendant has failed to establish that his attorney's performance was deficient or that the defendant suffered any prejudice. The defendant is not entitled to relief on this issue.

B. Motion to Suppress

The defendant also asserts that he received the ineffective assistance of counsel because his trial attorney failed to establish that there was no probable cause for the Stinking Creek Road affidavit. The attorney testified that he filed and argued a motion to suppress before the trial court. The attorney argued to the trial court that the affidavit lacked probable cause. He said, "[W]hat's left in here, your Honor, I submit still does not rise to probable cause when you look at it very, very closely and what they are actually alleging." The trial court denied the motion to suppress, which we have previously concluded was error. We conclude that the defendant failed to establish that his attorney's performance was deficient or prejudicial. The defendant is not entitled to relief on this issue.

IV. SENTENCING

The defendant asserts the trial court erred in finding enhancement factors not proven to the jury in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). The defendant asserts the trial court erred in using the presumptive sentence at more than a minimum without the jury finding any sentencing enhancements. The state asserts that Tennessee's sentencing scheme does not violate the Sixth Amendment. The state also asserts the defendant waived this issue on appeal for failing to raise it at the sentencing hearing.

Our supreme court held in State v. Gomez, 163 S.W.3d 632, 661 (Tenn. 2005), that failure to object on Sixth Amendment grounds during the sentencing hearing to the trial court's enhancement of a sentence constitutes waiver and that in any event, Tennessee's sentencing scheme does not violate a defendant's right to trial by jury as expressed in Blakely and United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005). Accordingly, the defendant's failure to object at the trial constitutes waiver, and the failure to provide jury sentencing was not error.

CONCLUSION

Based on the foregoing and the record as a whole, we affirm the judgments of the trial court.

JOSEPH M. TIPTON, JUDGE